DOCUMENT RESUME

ED 163 127 UD 018 833

TITLE Bakke and Beyond. A Report of the Education Commission of the States and the Justice Program of the Aspen Institute. Report No. 112.

INSTITUTION Aspen Inst. for Humanistic Studies, Palo Alto, Calif.; Education Commission of the States, Denver, Colo.

PUB DATE Jul 78

NOTE 45p.; Pages 35-37, copyrighted material, have been deleted

AVAILABLE FROM Education Commission of the States, Suite 300, 1860 Lincoln Street, Denver, Colorado 80295 ($4.50)

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage.

DESCRIPTORS *Admission (School); *Affirmative Action; *Civil Rights; *Educational Policy; Higher Education; *Minority Groups; Professional Education; Racial Discrimination; Socioeconomic Influences; *Supreme Court Litigation; Test Validity

IDENTIFIERS *Bakke (Allan)

ABSTRACT

In this booklet, papers presented at a 1978 conference on the implications of the Supreme Court's ruling in the Bakke case are reprinted. The issue of the constitutionality of special admissions programs for minority applicants is considered and related policy problems facing educators and political leaders are examined. The future of admissions programs and the creation of sensible policies for professional school admissions are also discussed. The Bakke case is reviewed and explained from a historical perspective. Questions of educational due process, the validity of test scores as a measure of merit, and the socioeconomic biases of the admissions selection systems are explored. (MI)

BAKKE AND BEYOND

A Report of the Education Commission of the States and the Justice Program of the Aspen Institute

Report No. 112

Education Commission of the States
Denver, Colorado 80295
Warren G. Hill, Executive Director

Richard M. Millard, Director
Postsecondary Education Department

July 1978

The Inservice Education Program is supported primarily by a five-year grant from the W. K. Kellogg Foundation.

Additional copies of this report may be obtained from the Education Commission of the States, Suite 300, 1860 Lincoln Street, Denver, Colorado 80295, (303) 861-4917. For each report send $4.50. This price includes postage and handling. Prepayment required.

Contents

Preface

"*Bakke* and Beyond," a conference cosponsored by the Education Commission of the States and the Justice Program of the Aspen Institute, took place on April 26, 1978, in Washington, D.C. The participants confronted the facts and implications of what one of them called the most important issue for higher education that has ever come before the Supreme Court of the United States.

The issue, of course, is the constitutionality of special admissions programs for minority applicants. The court's decision on the *Bakke* case will have a profound impact on all institutions of higher education in which there are substantially more applicants than places and where an effort has been made to enlarge the number of minority registrants by giving some kind of preference to such applicants.

This booklet offers some papers and remarks delivered at the conference, in the hope that they may be useful to educators, political leaders and others who are struggling to find the right course in a difficult area of social policy.

NOTE: On June 28, 1978, the Supreme Court of the United States handed down its decision in the *Bakke* case. Notes on this decision are found in Appendix III. We are indebted to Newsweek, Inc. and The New York Times Company for permitting reproduction of their material.

Louis Rabineau
Director, Inservice Education Program
Education Commission of the States

Robert B. McKay
Director, Program on Justice, Society and the Individual
Aspen Institute for Humanistic Studies

Introduction

However the U.S. Supreme Court rules on the *Bakke* case, we are left with the basic need to make higher education accessible to minority students. If our traditional approaches are not effective, or if they are illegal, then we must find others. We must develop strategies that are legal and contribute to the attainment of our long-sought objective of equality. We must continue our efforts to provide opportunity to those who have been denied it in the past.

Discrimination has been with us for a long time. No matter how fervently we might seek its elimination, it is tied into the warp and woof of our lives — not only in education or in admissions to professional schools. Some progress has been made in correcting the situation, but it often seems that we began "a day late and a dollar short." Educators alone cannot solve this national problem. Yet, because of the critical importance of education in the lives and futures of people in this country, they have an obligation to play a major role.

We must review with extraordinary care our current practices in higher education. The "we" in this review should not be limited to admissions officers or even the faculty senate, but should include all those responsible for providing institutions, programs and dollars, as well as those who are affected directly by admissions policy — the students themselves, and minority group representatives in particular. We need lawyers and other experts to help us find ways to get something done, not to tell us why we can't do it. We need to create understanding where it does not currently exist.

There is much misunderstanding of what postsecondary institutions are trying to do to provide greater opportunity for people from minority groups. Working in a web of unexamined beliefs, shibboleths, traditions, circumstances and an acceptance of things as they are, we need to correct the record, provide information and clearly show the advantage to *all* of assuring the full involvement and maximum contribution of all segments of society. We cannot do this quickly or alone. We need to form coalitions. Officials, organizations, associations and individuals all have a role to play. We must agree on what can be done and the strategies for accomplishing it.

As we proceed, we must avoid mechanistic approaches. It may sound simple to set up a lottery with a minimum qualifying level, for example, or to run admissions by means of appointments by elected officials and others, or to establish contractual arrangements whereby people are referred by other agencies. But if we are looking for success we need to be realistic. We need

to recognize what can be accomplished within the existing framework of higher education institutions in this country.

Whatever the court decides, we need the best ideas that can be generated by all of the interested parties. Only by proceeding on this basis can we make headway in our quest to provide equal opportunity for all. It will not be easy, but I believe it can be done.

Warren G. Hill
Executive Director
Education Commission of the States

An Overview of the Bakke Case and Its Possible Implications

Robert B. McKay
Director, Program on Justice, Society and the Individual
Aspen Institute for Humanistic Studies

The *Bakke* case — more formally, *Regents of the University of California (Davis) v. Allan Bakke* — is the case with everything, or at least something for everyone.

In the American constitutional law tradition, momentous issues are often triggered by a single individual who may be almost forgotten in the process. Although the case technically involves only the validity of denying Allan Bakke admission to medical school in 1974, there is no assurance that he will get a final answer in 1978. In effect, it has become a class action for the decision of large questions of constitutional law with a potential for enormous impact on higher education and even beyond into other areas of affirmative action.

The *Bakke* case is not a perfect case for the decision of those complex issues. The admissions program at the University of California Medical School at Davis was not typical of other special admissions programs; indeed, in respects to be noted it was extreme. Moreover, the facts surrounding the particular case are not as clear as one would like. Although the *Bakke* case may not be the ideal vehicle for deciding these vital questions of educational and constitutional policy, the U.S. Supreme Court has accepted the case for decision, and the decision will probably bear the burden of fixing the perimeters within which educational policy must operate.

Whatever the decision as to Allan Bakke, the ripple effect of the proceeding will be substantial. The narrow question of whether Bakke must be admitted to medical school will be overshadowed by the larger question of whether the admissions program at Davis is constitutionally valid or not. A ruling on the latter question will carry vast implications for preferential admissions programs at all medical schools, law schools and other units of higher education. The decision will almost inevitably have implications for other affirmative action programs, including employment generally.

What the Supreme Court says in *Bakke* will also be studied for relevance to its 1954 decision in *Brown v. Board of Education*, forbidding government-imposed segregation because of discriminatory intent and impact. The new question is this: Did *Brown* assure equal education opportunity through secondary school, only to have the door closed at the college and professional school level for lack of sufficient education attainment?

We must ask what the Court's answer will say of the American character. Racism, we know, persists in the United States. Can its impact be limited by private voluntary action, as was the intent of the Davis Medical School, or does that effort, however benign in purpose, unconstitutionally deprive other Americans of the equal protection of the laws? In short, is it possible to begin the process of compensating for past injustice without inflicting new injustice on persons innocent of any discriminatory practices?

Understanding of the issues in *Bakke* is impeded by the use of code words and phrases to characterize admissions programs to make them seem relatively benevolent or relatively malevolent. Consider two examples of the use of semantics to cloud the issue.

First, the admissions program at Davis Medical School has been characterized by friends as "affirmative action," which sounds benign enough, and by foes as "reverse discrimination," which sounds pretty bad. In between are the more neutral (and probably more accurate) descriptions of "minority-sensitive admissions," "special admissions" and "preferential admissions."

Second, the program at Davis is sometimes described as a "quota" system, a term carrying historic connotations of discrimination on grounds of religion, race, sex and ethnic background. The same program is described by its supporters as a system of "goals and timetables," the phrase often used in federally mandated programs of affirmative action. In fact, a number of the *amicus curiae* briefs on behalf of the University of California affirm their disapproval of quotas, but proclaim this a system of goals. What both descriptions have in common is an ingredient of numbers of minority students whose admission is sought to redress a past and continuing imbalance.

The Facts of the Bakke Case. In view of the semantic confusion that surrounds *Bakke*, it is time to state as objectively as possible the central facts of the case. Allan Bakke received a degree in mechanical engineering from the University of Minnesota in 1962. After graduate study there and service in the United States Marine Corps, he completed a master's degree in mechanical engineering at Stanford University in 1970. By 1972 he had completed the prerequisites for medical school.

In 1972 Allan Bakke applied for admission to two medical schools and was rejected by both. In 1973 he applied to, and was rejected by, 11 medical schools. In 1974 Davis turned down his second application to that school despite the fact that his prelaw school grade point average (GPA) and his Medical College Admission Test (MCAT) scores were higher than most or all the 16 minority applicants who were accepted.

The Davis Program for medical school admissions operated on two levels. In a class of 100 the general admissions program made decisions for 84 places, based on a complex formula of GPA, MCAT, interviews and even some preferences based on geography or other special factors. Although race and ethnic background were not taken into consideration, several minority students were admitted in 1974 as part of the general admissions program.

The Task Force Program, separately administered, was ostensibly a program to select 16 "disadvantaged" applicants. In practice, the places were almost invariably awarded applicants of minority race or specified ethnic background.

When Allan Bakke was denied admission to Davis in 1974, he sued in the California state courts, alleging violation of the equal protection clause of the 14th amendment to the United States Constitution, a similar provision in the California Constitution and Title VI of the Civil Rights Act of 1964, which bars discrimination on grounds of race, sex or religion in federally assisted programs.

The trial court upheld Bakke's claim on all the grounds he had urged, but conditioned his admission on proof that he would have been admitted if there had been no Task Force Program. The Supreme Court of California also held the Davis program invalid as a violation of the United States Constitu-

tion, but without reference to the state constitution or federal statute. Significantly, it shifted the burden of proof on the admission decision from Bakke to the university, ordering his admission unless the university could establish that he would *not* have been admitted if there had been no Task Force Program.

When the university conceded that it could not meet that challenge, the California Supreme Court ordered Allan Bakke admitted. That order was stayed by the Supreme Court of the United States in agreeing to review the case in a brief order in February 1977. The case was argued in October 1977. Soon thereafter the Court asked for additional briefs on the applicability of Title VI of the Civil Rights Act to the case. Following the filing of those briefs a decision is expected before the end of the present term of the Court — sometime in June 1978.

Meanwhile, the case has attracted the highest level of interest of any Supreme Court case in recent years. More than 50 briefs *amici curiae* were filed by early June 1977. Additional briefs were filed when the United States subsequently entered the case in qualified support of the university. The United States brief argued that it is permissible for a university to adopt a "minority-sensitive" program, but that the record in this case was not sufficient to establish whether the Davis program met the recommended test or transgressed the permissible. Accordingly, the brief asked the Court to remand the case to the California courts for further fact-finding.

Points of Agreement. Although differences remain sharp as to the proper outcome of the *Bakke* case, there are a number of propositions *not* at issue:

1. No one disputes the importance of the case. Higher education is generally recognized as the gatekeeper to conventional success in the United States. If ways are not found to assure minority group members access to higher education, including the professions, it will be increasingly difficult to attain the integrated society to which all aspire.

2. Racism persists in the United States. Affirmative efforts on the part of the private and the public sector are essential to the rooting out of discrimination on grounds of race or ethnic background.

3. Minorities are seriously underrepresented in higher education, when measured in terms of their proportion of the total population or even when measured against levels generally conceded to be desirable for racial and ethnic mix in this country.

4. If even the present proportion of minorities in selective institutions of higher education is to be maintained, some preference must be continued. The figures are very clear for schools of medicine, law and engineering, for example, that the percentage of minority students now in those schools (on the average 8 to 10 percent) would decline by 50 to 75 percent of present levels.

5. The admissions process is imperfect, particularly in placing principal reliance on such mechanical standards as test scores and grade point averages. Even though those factors are reasonably reliable in predicting performance, particularly in professional schools, there is no claim that they can be used to predict posteducation success in a profession or in life. However the particular case is decided, efforts should be redoubled to find new ways to test for determination, perseverance, ability to overcome obstacles (such as racial discrimination) and prospects for service in needed sectors of the economy.

6. Finally, in this roster of agreement, it is generally acknowledged that Davis did not accept any applicants, minority or majority, who were not qualified to perform the level of work required at that school at that time. Similarly, it would be a disservice to individuals and to the need for educated professionals to accept any individual not qualified to complete the prescribed course at Davis or any other institution of higher education.

Points of Disagreement. Despite the areas of agreement above identified, there remain important differences:

1. Does the Constitution permit taking race or ethnic background into account in admissions decisions? The debate on the constitutional issue is fueled by the fact that the

precedents point both ways. *Brown* and some of its progeny suggest a color-blind Constitution. But a number of cases in the same line have permitted the use of race as a factor in determining the need for busing or the drawing of school district lines. Election cases and employment cases have also taken race into account for some purposes. The reality is that a lawyer of average competence could write a rational constitutional argument either way. There is no controlling precedent on this new problem.

2. Disagreement is sharp as to the workability of alternatives to preferential admission. The California Supreme Court acknowledged *arguendo* that there is a valid social purpose served by enlarging the proportion of minority medical students, but said that result could be accomplished by enlarging the size of medical schools, increasing recruitment efforts or giving preference to the disadvantaged without regard to race. Proponents of special admissions reject each of these alternatives, arguing that classes cannot be enlarged sufficiently to bring in significent numbers of minority students; recruitment efforts are already substantial, and the "disadvantaged" criterion would principally produce more white applicants.

3. More speculative is the question as to what impact a denial of preferential admission would have on affirmative action programs and on race relations generally. Supporters of preferential admissions fear that an adverse decision would also jeopardize affirmative action programs and precipitate racial strife as minorities came to believe that opportunities for access to higher education and for advancement in employment were closed to them.

The Three Most Common Questions About Bakke. It is of course not possible to offer a definitive answer to any question until the Supreme Court speaks. But it is important to think about the future. Here are some speculations, all of which will soon be overtaken by the action of the Court.

1. *When will the case be decided?* Before the end of June 1978 (unless the Supreme Court puts it over for reargument or remands the case to the California courts for further fact-finding).

2. *What are the possible decisions?* The Supreme Court could affirm the decision of the California Supreme Court, holding the Davis plan invalid. But this could be for three quite different reasons: (a) the Court could hold that race could never be taken into account, thus invalidating the plan; (b) the Court could hold that race is a permissible factor, but the Davis plan is defective because it involves a quota; or (c) the Court could hold that race may be taken into account, but only on the explicit direction of a legislative body, state or federal. On the other hand, the Supreme Court could reverse, upholding the Davis plan (and by inference nearly all others). Taking a less strong position, the Court could hold that race can be taken into account in a goals and timetable way, reversing and remanding to the California courts for fact-finding.

3. *What next?* Whatever the decision, the important thing is for the media and the higher education community to react responsibly and carefully, not reading more into the decision than is there, and planning thoughtfully for a future to include constitutional efforts for a rational system of successful integration of higher education.

Organizations such as the Education Commission of the States, the State Higher Education Executive Officers, the American Council on Education, the Association of American Law Schools and the Association of American Medical Colleges will be confronted with an important challenge to keep the American Dream from falling apart.

Brief Remarks of Four Conference Participants

Larry M. Lavinsky
Attorney, New York City

The Task Force Program of the Davis Medical School provides an excellent example of how *not* to organize special admissions programs from either a legal or education standpoint.

First, there was a fixed racial quota — initially 8 out of 50 places; thereafter 16 out of 100 places in each entering class. Archibald Cox conceded on oral argument before the U.S. Supreme Court that 16 places were "set aside" for "qualified disadvantaged minority applicants" and that this "put a limit" on the number of places for which nonminority applicants could compete. The recent Carnegie Council Report on *Selective Admissions in Higher Education* states that "from the perspective of sound educational policy, we agree that the use of predetermined quotas are undesirable. Moreover, they serve no useful purpose, save a beguiling administrative simplicity; better strategies for organizing the admissions process are available."

Second, minority applicants for the Task Force Program were not compared with white applicants. This too was admitted by Archibald Cox in his oral argument. The Carnegie Council Report rejects such an approach: "All applicants should be processed through the same set of procedures to assure that they are looked at together and not separately, that an effective student body is being assembled and not separate quotas being met, and each person is being evaluated on his or her own merits."

Third, minority applicants were accepted below minimum standards required before the school would even consider a white applicant. The Carnegie Council Report states that "no students should be admitted who cannot meet the general academic standard set for all students."

Fourth, orientals were eligible for the program though far better represented in professional, managerial and administrative positions in the state of California than many of the white ethnic minorities who were excluded. Martin Meyerson, president of the University of Pennsylvania, gave an apt critique of the Davis program in the following quotation appearing in the *New York Times*: "I think the University of California behaved in a foolish fashion in this. It was rigid and stupid. I think what Davis should have done was strive to get 16 very able minority students, recognizing the fact that in some years they may have 20 and some years they may have 12."

Whatever the outcome of the *Bakke* case, we must fulfill our commitment to afford minority group members increased education opportunities. But if we are to avoid the kind of divisiveness *Bakke* has engendered, we must meet this commitment within the context of equal opportunity for all people. This poses an immense challenge. How well we meet it will determine the future health of our society.

Kenneth S. Tollett
Director, Institute for the Study of Educational Policy
Howard University, Dunbarton Campus
Washington, D.C.

Bakke poses an unprecedented threat to affirmative action not only in admissions in higher education, but also in government and industry. The assault on affirmative action throughout society, of which *Bakke* is a major instance, is the product of three converging forces that intentionally and unintentionally seek to constrict equal opportunity for blacks and other oppressed groups.

The first force is the product of tired, jaded and unnerved intellectuals and past reformers believing that society can accomplish more by doing less. The second force, closely related to the first, is the product of such reports as the Coleman Study for HEW, Banfield's *Unheavenly City* and Jencks' *Inequality*, which teach that there is no correlation between educational inputs and educational outputs, that class is a matter of attitude, parentage and neighborhood and not of socioeconomic conditions. The third force is the revival of interest in the genetic thesis regarding intelligence.

The effect of the convergence of these forces is to challenge the educability of blacks and other oppressed minorities and thus place into serious question the feasibility and desirability of special efforts to advance the status of these groups through education.

Special admissions programs in graduate and professional schools are indispensable for maintaining and expanding black presence in those schools. A negative decision in *Bakke* will also put a damper on open admissions and thus automatically have a negative impact on minority matriculation in undergraduate programs.

Finally, if race may not be taken into account in the admissions process, then there may be a serious question raised regarding the legality of minority sensitive higher education institutions such as predominately black colleges and universities, which still graduate the majority of black undergraduate students. However, since I think there is a reservoir of decency in our society, the U.S. Supreme Court will recognize the constitutionality, propriety and morality of special admissions programs and reverse the decision of the California Supreme Court against special programs.

James L. Curtis, M.D.
Associate Dean
Associate Professor of Psychiatry
Cornell University
New York City

Affirmative action admissions programs, specifically aimed at remedying the longstanding legally and culturally mandated racial exclusion of blacks and other underrepresented minority groups from medical schools, have been voluntarily undertaken by all the nation's medical schools since 1970. The Association of American Medical Colleges (AAMC) recognized that only two percent of all medical students and a similarly small percentage of all physicians were black, because medical education had been controlled by *de jure* segregation (up until *Brown* in 1954) and *de facto* segregation, which exists even now. The AAMC, with full support from all major medical organizations, set a target of enrolling 12 percent minority students by 1975. This goal was not met but minority enrollments reached 10 percent in 1975 and have been holding at 9 percent for the past several years.

Individual schools have had variable consistency of success in their programs, but their success has invariably been accompanied by strong administrative and faculty support either preceding or following a strong core of student support. A minority presence in the faculty and administration is essential, and it is important to have a program of high visibility requiring a sustained institutional effort. Cornell's program has as a centerpiece a summer research fellowship, 10 weeks long, for which 25 college senior premed students are selected from among 6 to 10 times as many applicants. A quarter of the minority students enrolled at Cornell in the past nine years were in this summer program; the remainder have come from the regular admissions process.

In all, 109 students, about 13 percent of all enrollees, have been minority students in the last nine years. Of the 109, approximately 58 are currently enrolled, 48 have graduated and only 3 have been dropped. This contrasts with the fact that since Cornell University Medical College was founded in 1896, only half a dozen American blacks were graduated before 1969. The medical school is stronger by having increased its base of alumni; the medical education program is more realistically based in a broader and more diverse student body; and the impact of all this on improving medical services to American communities is already becoming evident.

Millard H. Ruud
Executive Director
Association of American Law Schools
Washington, D.C.

From a historical perspective, we have come a long way in a short time. In 1948 the Supreme Court of the United States in *Sweatt v. Painter* was being asked to decide the relatively easy question whether a separate legal education program for blacks established by the state of Texas could be equal to that provided by the University of Texas for nonblacks.

Thirty years later, the Supreme Court is being asked in *Bakke* a more difficult and quite different question. Reflecting a dramatic change in our society, the question now is whether a state-supported medical school may use race, specifically the fact that an applicant is black, as a factor in deciding to admit the applicant. Thirty years ago a state was using the fact that a person was black to exclude that person from a state law school; today a medical school has used the fact that a person is black as a factor in including that person in its medical school student body.

From the short historical perspective of just 30 years, it now seems that the question facing the Court in *Sweatt* was almost a rhetorical one. The historic *Brown* decision rejected the notion that our country should be two countries. While we continue to cherish our cultural, national and racial diversities, we affirm the access of all to the public benefits.

I am uncertain how historians view Hendrick VanLoon's book, *Intolerance*, but its central point is that the insecurities and ignorance of the majority often explain its intolerance and fear toward other groups that it does not know. Perhaps we cannot realistically hope for a complete elimination of prejudice of one sort or another, at least in private relationships. However, I think we have done quite well in reducing that intolerance in the private sector. And this is in large part a product of actions we have taken in the public sector. Most of us wish for that ideal society in which each person is judged for her or his intrinsic merits and not upon the person's sex, race, religion, national origin, political affiliation or other characteristics. In this larger sense, it is important that the momentum of striving for that ideal society not be slowed by an adverse decision in the *Bakke* case.

Minority Group Enrollment in Accredited Law Schools. About two decades ago law schools became concerned about the fact that there were limited numbers of minority group students enrolled in their schools, other than at the predominantly black schools. Efforts were begun through admissions criteria, financial aid and recruitment to increase the number of minority group persons being enrolled in accredited law schools. It was not until the fall of 1969 that comprehensive national statistics were gathered concerning enrollment of the target minorities in law schools. The number of minority group students enrolled in schools approved by the American Bar Association has more than tripled since the fall of 1969. However, it is interesting that the enrollment of black and Mexican-American students declined slightly in the fall of 1977. We do not know the factors that explain this decline. My communications with admissions officers indicate that it is not a product of reduced recruitment or admissions efforts.

While minority group enrollment has more than tripled since fall 1969, the substantial increases in total enrollment (from 68,386 in 1969 to 118,453 last fall) means that the percentage that minority group enrollment is of the total has just doubled, increasing from 4.3 percent to 8.1 percent.

Increased Demand for Legal Education. The period of great interest on the part of law schools in minority group applicants and minority group college students in the legal profession and legal education coincided with the doubling of demand for legal education. During the last decade, about half of those who sought admission to law school have been unable to gain it. Nevertheless, law

schools have developed and expanded their special admissions programs, providing special admissions, financial aid and academic programs.

This expansion of opportunities for minority group persons to study law was done by the law schools to serve a complex of educational and public purposes. We all recognize that students are part of the teaching team. Legal educators are especially conscious of the role of students in educating each other, and even the teacher. Diversity in the student body has long been viewed an educational plus. Racial and ethnic diversity has been added in the last several decades to geographical, experiential and other diversities in choosing an entering law school class. All students benefit as a consequence.

We have historically admitted certain law students because of our judgment that they were very likely to make special contributions to the public once in the profession. To make a dramatic example, not many years ago there were almost literally a handful of Native American lawyers. A law school given the opportunity to admit an academically qualified Native American would do so and thus provide that community with law-educated leadership and legal services. The benefit to us all from that action is readily apparent. The role model that the successful black lawyer or doctor provides to the black high school student may motivate that student to seek professional education. Again, the benefits that flow to us all from this are readily apparent.

Conventional Admission Criteria. Law School Admission Test (LSAT) scores and undergraduate grade point averages have proved over the past 30 years to be the most reliable predictors of law school performance. And what research has been done shows that these predictors work as well for minority as for nonminority students. There is, of course, a cultural bias in any test using language, and so there is in that sense a cultural bias in both predictors. However, the culture in the test seems to be the same as in legal education generally. The research suggests, in short, that there is no inherent discrimination against any group in using these predictors to predict the law school performance of all applicants.

It should be apparent from the foregoing discussion that the appropriate admission qualifications are more than the quantitative criteria that may be used to predict law school performance. Special work experience and education have long been used. Race and ethnic background are only more recent applications of established admission principles.

Comparative Prediction Criteria. At the request of the Law School Admission Council, Franklin R. Evans of Educational Testing Service studied the application and admissions of the fall 1976 entering classes of American Bar Association accredited law schools. Segregation and discrimination were found to have left their legacy; there were significant differences in the LSAT scores and undergraduate point averages of minority and nonminority applicants as groups. If the law schools had made their admission decisions without knowing the race or ethnic background of the applicants, it is estimated that only 40 percent of the blacks admitted would have been admitted and only 60 percent of the Chicanos. These numbers dramatically demonstrate the public importance of the schools continuing to be able to use race and ethnic background as factors in making admissions decisions.

Beyond Bakke: The Unfinished Agenda in Admissions

Winton H. Manning
Senior Vice President
Educational Testing Service
Princeton, New Jersey

In May of last year, I was invited by the Carnegie Council to prepare a policy paper on selective admissions, with particular reference to the issues presented by the *Bakke* case. Many of you have read the report of the Carnegie Council, *Selective Admissions in Higher Education* (1977) and are also familiar with my paper on the pursuit of fairness in admissions (Manning, 1977), which is contained within it. Although I do not propose to discuss at length the policy analyses and recommendations contained within the Carnegie report, it seems necessary to begin with a few summary remarks on the position set forth in the Carnegie publication.

Fairness in Admissions. The central social and education issue of the *Bakke* case is how to balance individual and group equity, a problem whose resolution turns upon difficult value choices. Not all individuals or institutions will agree with whatever choice is made. But in this circumstance, the public must have confidence in the process by which decisions are made. The selective professional schools of medicine and law, in particular, must be prepared to face public scrutiny of their processes and their policies. Both their processes and policies must conform to their own missions and to the demands of the public that admissions decisions be fair. Additionally, colleges and universities must be concerned with making optimal use of their facilities to develop human resources for service to society. In the effort to reach this goal, race *is* relevant within the admissions process because important education and professional objectives will not be attainable unless, as colleges and universities go about making admissions decisions, the racial experience of minority applicants is given consideration. Simple justice requires that admissions officers take into account racial experience, particularly any evidence of an applicant's efforts to surmount the barriers of racial discrimination.

Nevertheless, a deeper appreciation of admissions procedures suggests that *how* race is considered may be very important in creating a fair admissions policy. Admission to college or graduate study should not be viewed as a contest. Rather, it is better understood as a complex system of "sponsored" admission in which responsible educators seek to advance the objectives of society and the professions through admissions policies aiming at optimal uses of human talent.

It is clear that there are ways in which the consideration of race — indeed, of nearly any human characteristic — could defeat the aim of fairness in admissions. A writer in the *New Republic* (1977) recently put it well:

> To be classified is to be judged as a member, not as a particular person. That is doubly threatening: first as to individual rights and then to the integrity of community life. Classification for a purpose other than sheer description . . . implies a hierarchy of classes. So it drives people to choose their groups, if they can, for reasons other than their private feelings and commitments. Admissions officers should look for personal strength — pride, energy, enterprise, compassion — with the understanding that these qualities are differently expressed in different cultures and tested far more harshly in some parts of our society than in others. But personal strength, by definition, is an individual trait, not a group trait. It cannot be recognized unless all members of groups are treated as individuals. It is difficult to do that with any degree of fairness in an egalitarian society. *But that is what doing justice requires.* [Emphasis supplied.]

What I argued in the Carnegie report is that race *is* a relevant consideration in admissions, but that it is the racial experience of individuals, rather than racial or ethnic identity, that should be emphasized as admissions officers look in depth at each applicant. Simple justice requires that admissions officers do no less (Manning, 1978).

With this somewhat lengthy preface, I should now like to turn my attention to some further implications of the *Bakke* case for admissions policy — in other words, look beyond *Bakke* to the unfinished agenda in admissions.

The *Bakke* case illuminates two problems that deserve more intensive discussion than they have received. Understandably, they have been overshadowed by the agonizing issues of racial justice and equality of opportunity, which are the central themes of the Carnegie report and of most of the vast and growing literature stemming from *De Funis* and *Bakke*. The two problems that I wish to address are "soft data" and "educational due process."

"Soft Data." In my policy paper for the Carnegie Council, I urged the importance of using additional admissions criteria beyond test scores and grades, not because these objective measures are invalid, but because I believe it is important for institutions to have a broad view of talent and to give appropriate attention to those personal characteristics of students that they believe to be especially relevant to the unique objectives of their programs. Whatever the outcome of the *Bakke* case, it is critical that institutions develop and maintain a wide variety of admissions criteria that are defensibly relevant to the institution's objectives. Many criteria beyond test scores and grades are used at present, though their use is often subjective and unsystematic. In this sense, they are the "soft data" of admissions because they are typically not objective or quantifiable, and they are very often unreliably observed.

Let me elaborate a bit more on what I mean by soft data in admissions. The term might usefully refer to information relevant to the admission of students that is not readily scored or quantified, but that *is* subject to reliable assessment under proper conditions. In general, this means reliance on informed, systematic judgment. A prime example would be the admission officer's impression of an applicant's character and background based upon interviews, recommendations, autobiographical essays, records of experience, outstanding accomplishments, etc. What is too often the case now is that such judgments are not systematic; nor are they checked for evidence of reliability or validity. The use of expert judgment in admissions is paradoxically fairly primitive even though widely used.

Certainly the experienced admission officer is more likely to be able to integrate such information and to make decisions wisely, in the best interest of both the student and the institution. Some can probably even pick applicants more likely to succeed than would be indicated by objective criteria of grades and test scores. On the other hand, many admission officers do not have the benefit of long experience, and for this reason much of the research literature concerning the reliability and validity of subjective judgment does not appear reassuring. A good deal of the discouraging results concerning soft data in admissions results, I suspect, from the fact that too much attention is given to the narrow notion of enhancing the prediction of grade point average — the traditional

criterion. Prospects for the usefulness of soft criteria are much more promising if one takes a broader view of the objectives of institutions and the variety of worthwhile education outcomes that signal success. Furthermore, work needs to be done regarding the training of those who use expert judgment in the admissions process.

With this in mind, what soft criteria do show promise? Let me cite four types, each connected with a rationale other than improving the statistical prediction of conventional grades — the shoal on which many efforts have foundered:

- Demonstrated achievement and accomplishment relevant to education outcomes sought by the institution (outcomes such as leadership, independent research and scholarship).
- Characteristics especially relevant to the mission of the institution (e.g., artistic, scientific and religious interests and accomplishments).
- Characteristics that will contribute to the education environment (e.g., cultural diversity, unique experiences).
- Evidence of unusual strength of character, personal qualities or sheer doggedness or persistence in the face of obstacles (including racial experience in overcoming obstacles of discrimination).

These soft criteria can be assessed and used in selective admissions with reasonable confidence, I believe, assuming that they are part of a larger picture of the student's many qualities and also assuming that the procedures for making such assessments are adequately specified and monitored. Each of these four types of soft criteria has *a priori* value in its own right, but each is also conceptually tied to something that the institution seeks to accomplish either through or on behalf of its students.

What needs to be done? If such supplemental criteria are to receive adequate emphasis in selective admissions, the rationale and justification must be carefully and convincingly demonstrated in relation to accepted objectives of institutions. Appropriate assessment methods will need to be developed. Some of these new assessments will need to be designed so that they can be carried out locally; some will probably need central support services from testing agencies. In the current climate of public scrutiny of the admissions process, great care will be necessary to implant new assessment procedures in an admissions process that has desirable characteristics. This is a large task that will require very substantial research and development of the most practical sort. It will take time and will require the close involvement of institutions. I believe it is an inevitable adjustment higher education will have to make, but it is not likely to be easy.

When one considers the role of soft data in admissions, it seems to me that the *Bakke* case poses a serious threat not only to racial and ethnic minorities but to all students, and indeed to the vitality of higher education institutions. The very notion of preferential treatment implies the existence of a unique order of merit among applicants. This assumption of a singular ranking leads "logically" to the allegation of invidious discrimination against those who rank higher in the ordering when preference is given to those who rank further down the scale. There is, I submit, no single unique order of preference among candidates, but many different ones; a particular ordering will depend heavily upon the weight attached not only to tests and grades but also to the soft criteria.

The very concept of preferential treatment implies reliance on a narrowly based concept of merit. The inexorable trend toward legal scrutiny and the demand for public accountability, often in very simplistic terms, also greatly threatens the use of such soft criteria and thus may lead to a rigidifying of admissions that is inimical to its conduct in educationally responsible and morally just ways.

Beyond this, *Bakke* poses additional, very serious long-term hazards. One possibility is a move toward a more mechanistic approach to selective admissions. Another is a serious dilution of the traditions of excellence and striving that have been a wellspring of vitality for American society. Either development is potentially damaging to higher education because either can easily stifle institutional diversity and responsiveness. A wooden ad-

missions policy is a certain step toward a rigid and sterile curriculum. Consequently, I feel it is critically important to harden the "soft criteria" and to move toward a more enlightened view of talent and more defensible procedures in selecting students who have the personal qualities and characteristics that fit the educational objectives and responsibilities of higher institutions.

I should now like to turn to consideration of the second message of the *Bakke* case — the critical importance of developing the concept of "educational due process" in admissions. (Manning, 1977; Gellhorn and Hornby, 1974; Willingham, 1978.)

Educational Due Process in Admissions. In my paper for the Carnegie Council I made the following statement:

> *Bakke* has cast a cold and relentless beam of light upon an area of institutional policy making — admissions — that has for too long lingered in the shadows. It is not merely for the benefit of applicants that admissions policies and procedures need illumination. Rather, the gatekeeping function of higher education requires that connections between stated institutional missions and goals on the one hand, and admissions policies and procedures on the other, be understood by various constituencies the institution serves. Some process akin to accreditation may be needed, in which an institution's admissions policies, procedures and practices are documented, carefully assessed and publicly evaluated by independent authorities. If the pursuit of fairness in admission to higher education is to have lasting, practical significance . . . admissions — no less than other areas of educational policy — should demonstrably express the values of the larger society, not only at the level of broad generalizations, but at the level of specific working principles (Manning, 1977, p. 41-42).

Higher education institutions can legitimately claim rights to autonomy and broad discretion in their admissions decisions. Nevertheless, both *Bakke* and *De Funis* have revealed some practices that need to be strengthened and others that need to be abandoned. A primary consideration that must govern admissions policies, I believe, is a concept of "educational due process," as I called it in my Carnegie Council paper. Unless the concept of "educational due process" is articulated by higher education and incorporated into their policies, we risk the stultifying consequences of the litigation that will ensue. The lack of demonstrable, systematic, clearly documented guidelines for making judgments about applicants is a keenly felt issue in all quarters of society. It would be infinitely preferable for institutions voluntarily to strip away the curtain of obscurity that too often veils their actions in admissions rather than to look to resolution of these matters in the courts.

I believe that educational due process requires that institutions adhere to 10 principles of good practice in admissions. These are:

1. Education institutions should clearly describe their admissions policies and explicitly state how these policies are related to the goals and objectives of the institution.

2. Institutions should publicly describe their admissions criteria and provide information to applicants sufficient to permit students to make a reasonable estimate of the likelihood of their meeting these standards.

3. Whatever criteria are used, the education institution should routinely allow applicants the procedural opportunity to demonstrate that those particular criteria or standards are inappropriate for assessing their qualifications.

4. Institutions should use the same admissions process for all candidates considered for the same program.

5. Where exceptions to uniformity of process, criteria and standards are made for particular classes of applicants, this policy should be publicly articulated with particular attention to the legal restraints on such actions.

6. The criteria employed in the admissions process must be validated — that is, shown to measure qualities relevant to the legitimate

education objectives of the educational program. Additionally, criteria should not be used that cannot be shown to be reliably assessed.

7. Upon request, a rejected applicant should be given a statement of the reasons for his or her rejection and a means of appeal by the applicant if he or she challenges the institution's explanation.

8. Selection criteria used by institutions should represent a reasonably broad array of those qualities shown to be relevant, rather than relying solely upon a single index of competence derived from ability tests and grades.

9. Institutions should insure that all those who participate in implementing admissions decisions are trained and competent to perform the complex task of evaluating candidates for admission in a fully satisfactory way.

10. Institutions should periodically invite external audit of their admissions policies and practices in order to assure the public and other constituencies that the process that actually goes on conforms with publicly stated policies, principles and procedures.

Implementation of these principles will not be easy. It will require that many higher education institutions make a substantially larger investment of resources in the admissions process than they are accustomed to. For some institutions, it will require a major overhaul of their policies and practices, entailing an even larger financial commitment — not an easy step to contemplate in these days of lean budgets.

Higher education in the United States operates today something like a public trust. It requires a mutual appreciation of the special relationship between the public's right to know and the institution's right to education autonomy. The adoption of these principles would go far to dispel the suspicion of capricious actions and veiled motives — suspicions that too often seem to characterize attitudes toward admissions that are widely held by applicants, their families and the public at large. *Bakke* has not strengthened public confidence in the process of admissions on the part of any groups in our society, minority or majority. Attention to assuring educational due process in admissions would go far toward reinforcing essential elements of the autonomy of institutions, by demonstrating "the concern of higher education for professional integrity and thoughtful attention to the needs of society" (Carnegie Council, 1977).

Conclusion. These two broad messages of the *Bakke* case — strengthening the soft criteria of admissions and implementing concepts of educational due process in admissions — exist in some tension with one another. It is often soft data whose use is hidden from public view; thus secrecy serves to cloak unreliable — even arbitrary — actions. Yet it is by way of the soft criteria that the vitiating effects of a narrow, wooden admissions policy are avoided. Soft data and educational due process must be pursued as parallel efforts, for each is inextricably linked with the other, and both are necessary to the maintainance of institutional vitality and public confidence and acceptance.

"The capacity of universities to continue to fulfill [their] critical role requires the development of educational policies that are wise and just — no less so for admissions than for other parts of the educational process. Where error exists, critics should root it out; where it persists the courts should eradicate it, but always with an eye toward preserving to the maximum degree [the] essential ingredient of education — freedom from unnecessary restraint. For universities, no less than for the community of learners generally, 'simply as education, freedom is indispensable' " (Manning, 1977).

References

Carnegie Council on Policy Studies in Higher Education, *Public Policy and Academic Policy*. (In a report of the Carnegie Policy Council on Studies in Higher Education, *Selective Admissions in Higher Education*.) San Francisco: Jossey-Bass; 1977, p. 1-17.

Gellhorn, E. and Hornby, D. B., "Constitutional Limitations on Admissions Policies and Standards — Beyond Affirmative Action," *Virginia Law Review*, 1974, *60*, 975-1011.

Manning, Winton H., *The Pursuit of Fairness in Admissions to Higher Education*. (In a report of the Carnegie Council on Policy Studies in Higher

Education, *Selective Admissions in Higher Education.*) San Francisco: Jossey-Bass; 1977, p. 19-64.

Manning, Winton H., "Discussion of the 'Influence of the Law on Professional Measurement Standards,'" *Educational Measurement and the Law,* Princeton, N.J.: Educational Testing Service, 1978, p. 53-60.

Willingham, W., "Policy and Practice in Selective Admissions," *Personal Communication,* Oct. 31, 1977.

Willingham, W., Breland, H., (et al.) *The Status of Selective Admissions.* (In a report of the Carnegie Council on Policy Studies in Higher Education, *Selective Admissions in Higher Education.*) San Francisco: Jossey-Bass; p. 66-244.

——, "Disadvantaged Groups, Individual Rights," *The New Republic,* Oct. 15, 1977, p. 5-9.

Toward a Fair and Sensible Policy for Professional School Admission

Peter J. Liacouras
Dean and Professor of Law
Temple University School of Law
Philadelphia

To demonstrate the need to look beyond code words and behind sacred cows, permit me to poke fun at myself. During a recent televion discussion show on the *Bakke* case, I was asked to define "reverse discrimination." There was an awkward pause while I silently outlined, with some sophistication, the complex subject matter which, at various times and according to different speakers, falls under that rubric. "Reverse discrimination," I blurted out, "is the opposite of old-fashioned or 'forward discrimination,' and it is just as bad."

Sometime later I realized that although substantively empty, such television rhetoric at least neutralized both sets of code words. It underlines our duty to reexamine *in context* the major assumptions and goals on which admission decisions are based if we are serious about moving toward a fair and sensible policy for professional school admission.

We have had more than a decade of experience with the impact of "racial minority admissions" on professional schools — some of it bad, but mostly good. The attitude we should have developed is not a "15 years ago or nothing" Hobson's choice by suggesting that we either continue business as usual or go back to 1963. The question is whether we have learned anything since then.

Fair and sensible criteria based on true merit, quality and potential performance as lawyers and community leaders will, in my judgment, produce plenty of blacks and other minorities in the professions. Such criteria will also produce a fair share of professionals of all races from economically poor backgrounds. We certainly should use scholastic achievement indicators such as grade point averages and standardized test scores. But we should not begin or stop there in our minds or actions; yet we have. We should not be conclusively bound by such indices; yet we have been. This should be the rule for everyone, not only for racial minorities or any other discrete group in society; yet it has not been.

Racial minorities have been, but should not be, the scapegoat for the numbers and admission crunch in professional schools. We should, instead, reexamine the larger issues of admission — the traditional admission standards and procedures. We should question the assumption that only numerical indices such as grades and standardized tests — the sacred cow — can measure quality, merit, individual worth or potential for performance in the trenches of a profession or community leadership. And we must pierce cost-benefit analysis

that rationalizes over-reliance on these indices and argues that faculty time is too valuable to be diverted to the tough task of making admission judgments.

Properly understood, admission to professional school is an issue that raises a series of policy judgments: who, from what groups in society, with what backgrounds and to achieve what kind of future profession and what kind of society, will be given the opportunity to enter the profession and become our future community leaders by first getting into the professional school? The same typology would apply to all professions, but I will use the legal profession as an example to help provoke a contextual analysis of these fundamental policies. With several qualified applicants for each available place in law school, and with the realization that access to the legal profession is a significant ladder to social, economic and political mobility, is there any other context in which to assess admission standards and procedures?

Group Needs vs. Individual Needs: An Irresistible Force Meets an Immovable Object. There are two fundamental societal goals in competition here. The first is the needs of the group (e.g., the Puerto Rican community needs more Puerto Rican lawyers and community leaders). The second is the needs of the individual (e.g., Jane Doe should be treated on her own individual merits).

Group Needs: An Irresistible Force. Simply put, there is an overwhelming group need for more black and other racial minority professionals in law, medicine, etc. Blacks, Hispanics, Asian Americans and Native Americans, who constitute between 15 and 35 percent of the population, depending on regions of the nation, constitute only about 2 percent of the professions of law, medicine and dentistry, and about 8 percent of the students in professional schools.

The need for more racial minority professionals is obvious to peace-loving Americans. We recognize the pernicious residual effects of the institution of slavery and other types of old-fashioned or "forward discrimination" even today on all of us. We also can observe the tendency of professionals to become role models and leaders in the very communities from which they spring.

The point is not that a black lawyer is consigned to serve only black clients, a white doctor only white patients, etc. The clear-cut tendency, however, has been along those lines. Especially in the Northeastern quadrant where ethnic neighborhoods have been preserved, the political leaders of a community have come from such discrete or identifiable communities. This is cultural pluralism and responsive democracy in action. We should not begin "reform," as the pro-Bakke forces urge, at the expense of blacks and other racial minorities just when they are finally beginning to produce a group of professionals and leaders for their communities and the entire nation.

Traditional White Ethnic Minorities and Some More Social History. The "group needs" goal refers not only to the Black, Hispanic, Native American and Asian American communities. It also applies to Americans whose roots are Polish, Italian, Lithuanian, Greek, Irish, Catholic, Jewish, etc., the "bluecollar, rowhouse, working class, Sunday sports-nut" prototype in "elitist" cartoons.

In debates about access to the professions, however, there has been a clear tendency during the past decade to consider everyone who is not a racial minority member as part of one Anglo-majority group. Such lumping has certainly worked to the detriment of traditional white ethnic applicants. They have been ignored. They have not been getting into professional schools at what they think is a decent enough rate. Perceptions count as well as actual results. Hostility between and even within minority groups has resulted, with the most extreme position being that attributed recently to Mayor Rizzo of Philadelphia. Rather than unmask policies that have Balkanized the black and white minority communities, a typical white ethnic response has been: "When it hurt to be a 'minority,' we were minorities; now that being 'minority' helps, we are not. Therefore [sic], the blacks are to blame and affirmative action programs must go."

Yet, if the four blacks who were part of the affirmative action program of 16 racial

minorities at Davis Medical School in *Bakke* were rejected, is it even probable that those seats would go to Italian-Americans, Polish-Americans, Appalachian or rural whites or other children from the blue-collar communities? Are white ethnics fairly represented in professional schools, the professions and national leadership?

The problem, I suggest, is not with affirmative action for blacks or Chicanos or women; it is that fair affirmative action is not universal enough. The problem, more directly, is with the 84 seats at Davis not subject to affirmative action. The real issue is the regular admission programs in professional schools. Are the standards and procedures that yielded this class fair and sensible, job related, demographically defensible?

Admission policy must be fair to all groups. So many groups should share in the American Dream that it is counterproductive and unfair to single out one group or to ignore others, as too many pro-Davis forces have urged. My first point, then, is a societal "group need" for *all* communities to get a piece of the action. This is an irresistible force.

Individual Needs: An Immovable Object. Simply put, the second societal goal is the individual's needs. By this we mean that access to the professions should be within the reach of every American determined by that person's own *individual* merit. Individual merit dictates that one innocent person not be deprived of fair treatment because of another person's wrongdoing. But merit does not attach simply by achieving better grades or scoring higher than the next person on multiple choice "aptitude" tests (e.g., LSAT). Individual merit means that we should look at the total relevant record and then select or pass over each person on the basis of what he or she has done and probably will do.

My second point underscores the need to look at the record of the individual rather than the group to which he or she may belong. The tendencies in our social history to treat persons conclusively as members of a particular group, and to grant them benefits or impose burdens solely on that basis, have been pernicious. It was not long ago that "Catholics need not apply" signs and Jewish quotas were facts of life. The newer call for "proportional representation" is beginning to take on characteristics of the old Jewish quota and should be exposed as such.

Should a worthy, innocent young man or young woman in 1978 pay for the sins of the general society or the sins of particular members of this or an earlier generation? If so, should such a burden be assessed in determining access to the professions? Will not racial, religious, ethnic and other intergroup bickering, turmoil and even violence predictably result from such policies? Or, I repeat, from policies that effectively deny access to the professions to almost all members of a minority group as does overreliance on the LSAT?

This, then, is the immovable object.

The Need for Honest Pragmatism in Clarifying Common Interests of Everyone. Pluralism is the lifeblood of a nation built on freedom, equality of opportunity to succeed or fail on your own merits, and a legitimate diversity that emphasizes our common humanity. Each of us should, on individual merit, be given an equal opportunity. Equal opportunity is not the exclusive preserve of the members of just one or several groups in society. It is due each of us. We must learn to think not in either-or terms, or as majority versus minority, or by ostensibly neutral principles masking real intentions and results, or by *reductio ad absurdum* logic or overladen with patricians' burdens. Honest pragmatism is needed to clarify our common interests.

The Inadequacy and Mischief of the Sacred Cow. One might respond that all we have to do is "apply the standards." Certainly, that response cannot mean such discredited, nonegalitarian standards as the "good old boy" or "Harry's son" or the "Congressman's candidate" or the "old Jock" or the "school's big donor." These standards have quietly been used for as long as memory, but practically never to help racial minorities and the poor. Such policies have not yet been overcome, and insufficient scholarly and lay attention has been directed at them.

By the response "apply the standards," one may mean to let those in who are qualified

and keep out the others. Everyone agrees. Our challenge is this: If there are three times as many qualified applicants as available seats, who should sit in them? Why has the answer been the sacred cow, i.e., the grade point average and the relevant standardized multiple-choice test, and even more particularly the so-called aptitude portion (LSAT, MCAT) of it? The designers and even the sellers of the LSAT warn against overreliance on them ("they should be used only in conjunction with other valid admissions factors"). But the caveat seems more like a whisper and has not been heard.

The LSAT Is Too Narrow as a Lawyering Aptitude Test and Is Not Synonymous With Merit. The LSAT does not measure, and indeed was not designed to measure, a person's capacity for being a good lawyer or community leader. The LSAT was designed solely to predict performance in the first year examinations of law school. It purports to measure narrow analytical skills and quick response. The analytical skills it is primarily aimed at are the *syntactic* (implication, coimplication and other logics more like a closed language system such as mathematics) and *semantic* (referents to the real world of the tester) rather than *pragmatic* (the "so what") skills.

Do your first-year law school grades tell us how well you will do in the real world? Does the fact that you rank higher in the class than the next person mean that you are more qualified to be a lawyer or more likely to be a better lawyer? You may be a great law student but a corrupt or incompetent lawyer. In fact, there is no systematic study validating which law students actually do become the best lawyers — although there are apocryphal stories such as the one holding that "A" students become the professors and "B" students the judges, while "C" students make all the money!

What the LSAT does not even purport to measure — and what is not seriously and systematically measured in most general admission processes — turns out to be so much of what *does* count in lawyering and good community leadership: common sense, self-discipline, motivation, judgment, practicality, idealism, tenacity, fidelity, character and maturity, integrity, patience, preparation, the ability to listen, perseverance, client-handling skills, creativity, courage, personality, oral skills, self-confidence, organizational ability and leadership.

These qualities you may have in abundance, but the tests and the professional gatekeepers may pay them no mind. Does the fact that you study 40 hours a week to achieve a 3.0 grade point average and that another applicant studies only 10 hours weekly for a 3.5 average mean that you are less meritorious? Does the fact that you hold a 40-hour-a-week job during the school year to pay for your education while earning a 3.0 average mean that you are less qualified than another applicant whose parents pick up the entire tab, who does not hold any job and who "achieves" a 3.5 average? Which person is more likely to be a good lawyer?

Does the fact that you are black, the son of professional parents and score in the 70th percentile on the LSAT mean that you are more meritorious or will do better in practice than another applicant who is white, the daughter of a first generation coal miner father and stay-at-home mother, who slept in the same bedroom with six sisters and scores in the 50th percentile on the LSAT?

Why should you obey your parent's injunction to be honest, to help others, not to be selfish, to persevere and not to be tempted by material opulence if none of these facts count in competition for scarce resources [illegible] professional school seats? Are these not crucial of merit, aptitude for lawyering or community leadership? Why should you be a good citizen if all that counts in getting to the professions is test-taking skill?

When we are told that "when other things are equal, the applicant with the better test scores is more likely to succeed," is there a commitment to search out and consider for everyone such facts and judgments as these? Is such a commitment limited only to racial minorities? Is that fair and sensible? How can we assume "other things are equal" unless we look at the record?

It bears emphasizing that we are not discussing unqualified applicants. We are focusing on

qualified applicants, regardless of race, national origin, etc., who are passed over because their test scores are lower than those applicants who are admitted, not necessarily because they are less qualified on merit or job potential.

There are other problems with the LSAT. It was on the question of racial minority admissions that the discriminatory effect of the LSAT was first realized. The social history of the 1960s called into question one of the features that had recommended the LSAT — its apparent fairness and freedom from bias. As reliance on the LSAT increased, the number of black law students in predominantly white schools decreased to virtually nil. Overreliance on the LSAT was excluding Black and Hispanic applicants disproportionately. Rather than calling into question the major premises of the sacred cow, this glaring defect was considered to be merely a unique social exception that "proved" the validity of the LSAT and similar standardized criteria. We believe what we want to believe.

What has not been fully realized, however, is that white ethnic minorities are also being turned back by the same professional school gatekeepers. Data from 1975 indicate that the median LSAT score for students from two colleges with a substantial number of Slavic or Polish-American students (Alliance and St. Procopius, now Illinois Benedictine College) was 473 and 468 (about the 28th percentile). Meanwhile, the median LSAT for students at two predominantly black universities, Howard and Fisk, was 418 and 400 (about the 15th percentile). These scores compare with the M.I.T. median of 674 (93rd percentile). Comparable studies of colleges with substantial numbers of other ethnic or racial minorities would probably yield similar results. There is no way, given the overreliance on standardized tests, that the door will open to the 28th or 15th or 50th percentiles when the 80th or 93rd are also knocking.

But is the median M.I.T. student necessarily more likely to be a better lawyer or community leader for some groups or the nation in a pluralistic society than the median Alliance or Fisk student? Hardly. It all depends on a host of relevant factors that do not become "other things being equal" unless you look at, consider and fairly weigh them. For me the LSAT median, in general, may count less than the language and subcultural experiences that the median Alliance or Fisk student probably possesses and that the median M.I.T. student probably does not have. Before making my final decision, I would want to know more than such limited, abstract probabilities about each applicant. Yet, our sacred cow, our societal mind-set, blocks further serious inquiry and precludes empirical verification of the advantage of the M.I.T. student and the detriment of the Alliance and Fisk students.

Indeed, the advantage of fluency in a second language, culture or subculture is somehow transformed by rhetoric reminiscent of colonialism so that one becomes "culturally deprived," "disadvantaged," "not fully developed," or "unqualified to learn." These are the same slogans used to thwart the national independence of peoples in Africa and Asia. In the United States this attitude defends "regular" standards that systematically exclude blacks who then become the proper object of paternalism as in my Fisk example, and that have only marginally diffefent results for white linguistic or cultural minorities (such as Polish-Americans) who are ignored as "one of the majority" as in my Alliance example.

Is that a fair and sensible admission policy?

Based on present trends, our young ethnic friends will probably find the door to the professions closed. It is a statistical fact that not only Blacks, Hispanics and Native Americans, but also other groups whose first or family language is not standard English (our traditional white ethnics) and who are not a product of the elite preparatory school system, are outscored on such tests by native-born majority Americans who are. This has little, if anything, to do with brains or ability or merit or predicting who will do best in the profession.

These ostensibly objective tests are not the easy-to-recognize "minorities keep out" obstacles such as the Jewish quotas and "Catholics need not apply" practices of the early 1900s. But they are just as effective barriers. The systematic exclusion of racial and white ethnic minorities by such continued overre-

liance on the LSAT is discriminatory and indefensible.

How then, can one reasonably argue, in the words of the Private University Amici in *Bakke*, that "societal benefits are so doubtful" from their possible abandonment, as not to warrant a change for any except racial minorities? Those who argue for true individual merit must answer this question.

From the cradle to the grave, we are increasingly being judged on the basis of artificial, "objective," standardized tests, rather than on our total merit and practical performance. Such overreliance on standardized tests is not only bad for racial minorities and white ethnics. It also inhibits well-roundedness in all of our youngsters. It tends to pollute our educational processes with an instant-result orientation and a phony elitism. It glorifies quick cleverness. Unchecked, it may produce a superabundant monotony, a sameness in our professions and nation.

Some Concluding Points. What is the next step?

One partial solution would be to take several times as many students into medical, dental, law and other professional schools. Indeed, we could let everyone with minimal qualifications attend and place the burden on law faculties to weed out those who are actually incompetent. Such an approach takes courage. It would require a major reorientation in thought and action. Each profession's lobby would, of course, resist such solutions, although the legal profession has demonstrated a much greater inclination to expand. Law school enrollments virtually tripled during the past 15 years. There is a great temptation to pull up the rope when you reach the top of the mountain!

Even then we would probably continue to experience a numbers crunch, even if it were not the present excess national demand of three applicants for each available seat (or that of "selective" schools with 10 applicants), almost all of whom are qualified under reasonable criteria. The major thrust of our criticism and reexamination of admission policies would still have to be faced.

Certainly, each profession must maintain the highest practical and fair standards, and protect the public from incompetence and treachery. But we see that, under the false banners of "neutrality," "high standards," "objectivity," "the need for one-on-one clinical education" and the like, plenty of mischief has been and continues to be perpetrated.

A fundamental caveat is appropriate at this point. We should be fully aware of an earlier social history filled with excessive, unchecked use of subjective factors to the detriment of Jews, blacks, etc. Accordingly, the standards and procedures used to supplement numerical indices with other relevant portions of each applicant's total person must be subject to effective audits. Those audits should be both internal, within the law school, and external, by agencies such as courts.

The goal of increasing the number and quality of racial minority lawyers in the United States is a national goal. It should not come about at the expense of white ethnics (such as children of the last generation or new immigrants) who are individually and, as a group, blameless for slavery, the old barriers and the woefully inadequate number of racial minorities in the professions. Neither should the present majority suffer for transgressions of an earlier generation. Fairer and less arbitrary approaches should be given a chance to work. But not with "deliberate speed" if that means slow.

As an example of one possible alternative — realizing that it is not a panacea — I will now briefly describe the Temple Law School Sp.A.C.E. Program.

The Temple Law School Sp.A.C.E. Program. At Temple Law School there are two routes to admission: nondiscretionary and discretionary. As to nondiscretionary admissions, roughly 60 percent (this percentage varies annually) of the 1977 entering class were admitted "through the numbers," which means using almost exclusively the college grade point averages and the LSAT scores. At Temple there was room in fall 1977 for only one in nine of our applicants. The median grade point average of that group was above 3.5 and the median LSAT well up in the 600s, which means in the top 10 percent of the

takers of that examination. Almost all of the persons admitted through this nondiscretionary formula were white men and white women.

As to discretionary admissions (i.e., the Sp.A.C.E. Program), during the past six years there have been approximately twice as many whites admitted as racial minorities through the Sp.A.C.E. Program. The Fall 1976 and 1977 entering class experiences were not substantially different. Our Sp.A.C.E. Program seeks out and carefully, individually and affirmatively selects those applicants — minority *and* majority group members — who have an outstanding performance record and an exceptional aptitude for the study and practice of law and community leadership, not necessarily reflected by their LSAT scores.

Our student body of 1,145 is, we believe, the equal of any in the nation. Although women now constitute 39 percent of our student body (not the 2 percent of 13 years ago), our racial minority students are still only about 12 percent, with blacks making up 9 percent of the total enrollment, up from less than 1 percent 10 years ago. The percentages of women and minorities in the fall 1977 entering class were somewhat higher. We do not shoot for numerical goals or quotas, just the best available persons.

Temple Law School's Sp.A.C.E. Program has followed in the spirit of the founder of our university, Russell Conwell. We have maintained our populist tradition in making a superior legal education available to highly qualified working men and women and their children, irrespective of ethnic or racial or social origin or religious heritage or favoritism. Each is treated on his or her individual merits.

Every applicant admitted to Temple Law School brings in a very strong academic record. Some, thus specially admitted, have extraordinarily high grade point averages from college but LSAT scores below those regularly admitted. Others have exceptional work experience, two or three languages, experiences with minority cultures, a record of leadership, overcoming racial, religious, ethnic bias or physical handicap that would have neutralized the ambition and ability of the average person. Many picked themselves up by their own bootstraps. As a group, they include men and women from practically every racial, ethnic and economic class, religion, age group and walk of life.

Every student at Temple Law School is treated precisely the same. Each has an equal opportunity to succeed or not to succeed on his or her own merits. We do not have two classes of citizenship, in body, mind or spirit. There is no second-class citizenship syndrome holding that "whites are admitted 'on their merit' as a right and blacks are 'allowed' in by sufferance." That point is crucial to our success.

Our program is popular with our students, who prefer to be treated as individuals rather than as members of a majority or minority group. It is popular with our faculty, who are primarily concerned with the maintenance of the highest academic and professional standards of excellence. And it is popular with our alumni, who are very practical people.

We have sought to fulfill our historic commitments to excellence and populism by doing the extra work — literally 10,000 person-hours last year logged in admissions by our faculty members and administrators. Such allocation of resources is an indispensible reason for our success, and we reject the argument of others who claim that "the benefits are so doubtful." A thoughtful, reasoned defense is made by three (and sometimes up to five) faculty members and administrators for each Sp.A.C.E. decision. The process is long and frustrating, but we are developing some objective standards in exercising sound discretion in each case.

To illustrate the scope and yield of our admissions process: There were 3,250 applicants in 1977, and some 2,000 of these were individually and personally reviewed for consideration under the Sp.A.C.E. Program. This means that in each of the 2,000 cases, some discretion was exercised.

In the 1977 entering class there are 382 students. Of these, 224 were admitted "through the numbers," having scored at least 2,470 on the nondiscretionary numerical index. The remaining 158 persons in the first

year class were admitted via discretion, i.e., by the Sp.A.C.E. Program. Of the 158 admitted through the discretionary route, 44 were racial minority group members and 114 were majority group members, including many white ethnic minorities.

The number or percentage of students entering Temple Law School via discretionary or nondiscretionary routes is not fixed. It is not necessarily repeated. Nor is it set aside exclusively for members of any particular group in society. Indeed, discretionary admissions have ranged from about 3 percent in 1971 to 40 percent in 1977. The basis for admission is our judgment of the individual merit and potential for lawyering and community leadership of each individual applicant competing with all others that year.

At Temple, we began six years ago to move slowly and, we think, carefully in the right direction. We are finding that overreliance on grades and test scores was denying individuals from many groups in society a share of the American Dream, and that a good percentage of those excluded are at least as deserving and as qualified as many who were getting into law school "through the numbers." So we are doing something about it. We are not perfect, but we are trying to be honestly pragmatic.

Appendix I — A Historical Perspective: What Led to Bakke*

Kenneth S. Tollett
Director, Institute for the Study of Educational Policy
Howard University, Dunbarton Campus
Washington, D.C.

Most major political and many social questions or problems in the United States tend to be formulated or posed as constitutional law questions. Whether under any circumstances blacks could be considered as enjoying any of the rights, privileges or immunities under the U.S. Constitution was answered before the Civil War, in 1857 in the infamous Dred Scott decision. The effort after the Civil War to protect nationally the privileges and immunities of the citizens of the several states in the 14th Amendment was frustrated in 1873 by the sophistical interpretation of the privileges and immunities clause in the curious Slaughterhouse cases. The protection of the civil rights of blacks to public accommodations enacted in the 1875 Civil Rights Act was absorbed in 1883 by the Civil Rights cases. In 1896, *Plessy v. Ferguson* enunciated the vicious and pernicious separate-but-equal doctrine. In 1954, *Brown v. Board of Education* overturned the separate-but-equal doctrine of *Plessy v. Ferguson*. All of the preceding cases were of signal importance in determining the rights, privileges and welfare of blacks in the United States. Today the *Bakke* case is of comparable significance, and its implications may be even more far reaching.

Few cases in constitutional litigation have engendered as much controversy and agitation as the *Bakke* special minority admissions case. Few people of good will and discernment can approach with unreserved comfort the notion that race should be taken into consideration in the admission of students to higher education institutions.

However, good will and discernment are not the only qualities of mind that should inform the perception of individuals looking at this case. There is the historical perspective. The historical perspective tells us that blacks suffered in this country more than 200 years of slavery and nearly 100 years of officially sanctioned segregation, all of which oppressed, dehumanized and injured blacks as human beings. The country made a positive attempt to correct the history of slavery in the 13th, 14th and 15th Amendments to the Constitution and in the Reconstruction Civil Rights Act; but, due in part to some of the Supreme Court decisions already mentioned, the attempt was unsuccessful. A decision in the *Bakke* case cannot appropriately be made without taking this history into account.

*This article, which appeared in the January/February issue of the *Change Magazine* (reprinted here with permission), is adapted from a chapter in Kenneth Tollet's recent book, *Beyond Desegregation: Urgent Issues in the Education of Minorities*,

The white majority group in this society has been unjustly enriched and advantaged for more than 300 years at the expense and to the injury of blacks and other oppressed minorities. Principles of equity, justice and morality require that when one has been unjustly enriched at the expense and to the injury of another, he should make restitution to the injured party. Providing restitution to those who have been injured by gross deprivations and oppression is not "preferential treatment" or "reverse discrimination" but compensatory assistance and the reversal of discrimination.

The participation of blacks and other minority groups in higher education, particularly in graduate and professional schools, has been substantially increased or improved by special minority admissions programs. If these programs are discontinued, the admission of blacks and other minorities into graduate and professional schools will be terribly curtailed. Blacks' access to and distribution in a broad cross-section of institutions will be impaired by eliminating these programs. Black and other ethnic studies programs will be brought into some question. Predominantly black colleges and universities, particularly their graduate and professional schools, will be threatened. The entire affirmative action program will be enshrouded in doubt and uncertainty.

No matter how much one may disagree about the proper interpretation and application of the relevant abstract principles to this controversy, if the programs are not upheld, if *Bakke* is not reversed, the forward progress of blacks and other similarly situated minorities will be severely stymied. Indeed, I maintain that the affirmance of *Bakke* would mean the reversal of affirmative action; it would be an officially sanctioned signal to turn against blacks in this country.

What I propose to do here is briefly review *Bakke* and similar related cases; state their implications for the higher education of minorities; defend special minority admissions programs; and argue that opposition to such programs probably conceals hostility to blacks.

Special minority admissions programs are under attack. Ten recent court cases have challenged their legality. The challenges have thrown a storm cloud over the affirmative action concept in employment. The decisions in both the education and employment areas are uneven. Overall, blacks and other minorities have experienced education advances that are now threatened considerably by some of this litigation. Special minority admissions programs and affirmative action can be defended. Opposition to special minority admissions programs and affirmative action is antiblack.

I am amazed at the upsurge of interest in merit and racial neutrality. This interest abhors any classification or regulation based on race or sex. Where were the present holders of this interest for the past 300 years?

The first court case to capture widespread interest in special minority admissions programs was *DeFunis v. Odegaard* in 1973. In that case, the Washington State Supreme Court, applying the "compelling state interest" tests, upheld the special admissions policies of the University of Washington School of Law. The court maintained that the consideration of racial or ethnic background as a factor in the selection of students did not violate the equal protection clause of the state and federal constitutions, notwithstanding that white applicants with higher test scores were rejected. The U.S. Supreme Court determined in 1974 not to review the case on its merits because it had become moot; DeFunis, the person who brought the suit, was about to graduate from law school.

In *Stewart v. New York University*, in 1976, a white female claimed she was not admitted to a private school because of racial discrimination. The court held that 42 U.S.C. § 1981, which was a part of the 1866 Civil Rights Act, protected whites as well as minorities, but dismissed plaintiff's complaint because she failed to show she was denied admission solely due to her race and because she did not show substantial federal funding. Another white female lost such a suit against the University of Arkansas Law School in 1975 because she failed to prove that she would have been accepted in the absence of the special admissions program. Another

white female applicant for law school in Toledo lost such a suit in 1976 on the ground that schools are not restricted to purely academic standards in their admissions procedures.

Still another white female lost an admission case in 1975 in North Carolina. The court here decided that not only minority and poverty statuses legitimately were relevant, but also state residency and offspring of alumni statuses in the admission process. The consideration of poverty and race was given to extend, not deny, a benefit. Thus, only the rational basis test applied, not the strict scrutiny standard. Special concern for minorities and the poor was a legitimate interest and the admission program was rationally related to, or served, that interest. Preference for residents was considered reasonable since the school was state-supported. Since alumni provided substantial support for the school, it was legitimate to give their children special consideration.

A 50:50 white-nonwhite ratio was struck down in *Hupart v. Board of Higher Education of City of New York* in 1976. The school also failed to follow its own regulations. Targeting a definite amount of financial aid for minority students was struck down in the Georgetown Law School case in 1976, because the court determined that financial need was not peculiar to minorities and that financial assistance should be granted to whoever demonstrated need. Sixty percent of scholarship funds were allocated to minority law students, although they made up only 11 percent of the student body. Nevertheless, the court conceded the school might have to deviate from traditional admission procedures because of cultural and social factors that had a negative impact on minorities.

In still another New York case in 1976, the court of appeals, applying the "substantial interest" test, held that "reverse discrimination" may be constitutional if no "nonracial or less objectionable racial" classification would accomplish the same goals. Nevertheless, the court did not make a full determination on the merits because Alevy, the complainant, did not prove that he would have been admitted in the absence of a special admissions program.

The above cases set the stage for the *Bakke* case. A number of points should be noted. First, quite a few white females have challenged special minority admissions programs. This confirms my adumbration at the 1973 American Council on Education meeting that the feminist movement and the black civil-rights struggle might unfortunately be on a collision course. Second, white complainants should be required to show injury by these programs, and that is not easy to do. Third, it is critically important to determine whether minority participation in graduate and professional education can be maintained or expanded without taking race into account.

The *Bakke* case is very troubling on the last two points. Although the superior court (trial) found that the University of California-Davis Medical School's special admissions program was unconstitutional because race was considered in the admission process, it held Bakke was not entitled to relief because he failed to prove that he would have been admitted were it not for the program. However, the California Supreme Court held that the burden of proof was on the University of California to establish that Bakke would not have been admitted even in the absence of a special minority admissions program. The evidence is very scant on this matter, and the issue is in effect stipulated away. However, the California Supreme Court did apply the "compelling state interest" test and required the school to show that no less objectionable alternative was available to increase minority enrollment in the medical school. I submit there clearly is not such an available alternative which means that a refusal to approve such programs is, in effect, to oppose the maintaining and expanding of minority presence in the professions.

It may be useful to turn now to a discussion of the implications of the *Bakke* case, particularly for legal education and the bar. It is noteworthy that the deans of the four publicly supported law schools in the state of California filed an *amicus curiae* brief in which they urged the U.S. Supreme Court to

grant a writ of *certiorari* to the Supreme Court of California so that the issue could be authoritatively resolved upon its merits. They note that blacks make up barely 1 percent of the legal profession, although they constitute more than 11 percent of the population. I would add that, in 1964-65, black law students constituted 1.3 percent of the entire law student enrollment that year. In 1974-75, 10 years later, in large part due to special minority admissions programs, the percentage had risen to nearly 5. The deans say at page 27 of their brief: "If there is a race-blind method of selection in a unitary program that will select out a meaningful number of persons from a relatively small group of minority applicants in competition with a much larger group of whites, we do not know what is is."

This conclusion is reached after a fine-tuned analysis and comparison of the admission credentials of minority and nonminority applicants.

I must confess that it is troubling for me to advance the argument here, because I do not like spreading further on the record the gap between the admission credentials of blacks and whites. I will not deny or falsify the facts, no matter how unpleasant or embarrassing they may be. For example, the mean score of blacks on the Law School Aptitute Test (LSAT) is at least 100 points less than that of whites. Black applicants for medical school in the 1977-78 academic year have mean scores on the verbal, quantitative and science parts of the Medical Colleges Aptitude Test (MCAT) that range from 102 to 127 points less than those of white applicants. Although the gap is less for those who are actually accepted, it is still clear that if decisions were based primarily upon test scores, the size of the white pool taken together with the average test-score competitive advantage of whites, would have practically eliminated blacks from admission to medical schools last fall. And those scores are not atypical. Admissions based on applicants' grade-point averages in their undergraduate work do not significantly change the picture.

Now I could discuss — and I have discussed — the social and cultural bias of standardized tests, including the Scholastic Aptitude Test, LSAT and MCAT. These discussions are necessary for the self-esteem of blacks. Our scores just do not look good. However, some time ago I wrote that tests and other norms developed by the dominant white society will reflect and confirm their values and evolved skills. Can there really be a serious claim that they should be to the contrary? I could easily take some cheap shots at tests, but as I used to say to my black law students, "Black English is lively, expressive and groovy, but I suggest that you write your pleadings, compose your briefs and make your oral arguments in standard English. You are more likely to succeed that way." We are going to have to work at improving our performance on these tests.

Some people feel that if we do not attack standardized tests relentlessly we will be giving aid, comfort and corroboration to Arthur Jensen, W. G. Shockley, Richard Herrnstein and others who have questioned the innate intelligence of blacks. My approach to tests is like my approach to most issues involving blacks. I do not automatically deny data that adversely reflect upon blacks. I do check the data very carefully. If they prove true in some respects, I follow a course frequently followed in law. I "confess and avoid." It is to be expected that because of the unequal history that blacks have experienced in this society, a disproportionate number of us will deviate from white norms. I will say more about black history later.

The *Bakke* case has already had a chilling effect upon black enrollment in California law schools, according to a report in the *Chronicle of Higher Education*. It is inevitable that, in time, if it is not reversed, that will be the effect throughout higher education. The latent and not so latent racism in this country will jump out of the cracks in the wall when it can be camouflaged or justified on the pretext that the law of the land requires it. The separate-but-equal doctrine would not have been so detestable but for the fact that it gave a patina of spurious evenhandedness to the blatant oppression and subjugation of blacks. Some may not realize it, but in answer to the claim that

segregation laws were designated to oppress blacks, Justice Henry B. Brown wrote for the majority in the *Plessy-Ferguson* case that laws must be "reasonable . . . enacted in good faith . . . for the promotion of the public good, and not for the annoyance or oppression of a particular class." Opponents of affirmative action and special minority admissions programs like to refer to and focus upon the color-blind rhetorical dicta in Justice John M. Harlan's dissent in *Plessy-Ferguson*. The key thing to focus upon in that dissent is Justice Harlan's recognition that "equal" in the separate doctrine was a thin disguise for degrading and treating blacks as inferiors.

In all candor I must confess that I am pro-black. I am deeply committed to meeting the needs and aspirations and to overcoming the racist oppression of blacks. Moreover, suppositious talk about color-blindness and merit strikes me as less than thinly disguised hostility to blacks. If opposition to special minority admissions programs does not disguise hostility to blacks, then certainly it discloses a lack of seriousness about facilitating a significant increase in blacks' access to graduate and professional schools.

I recognize that no matter how strongly we might feel on these issues one way or another, we are bound to attempt to engage in a rational discourse. Decisions and reasons need not always be rationalizations of prejudices and self-interest, although they frequently are. Yet, it is obvious that if one understands how a given position or proposition will serve his personal interest or those interests with which he closely identifies, he will tend strongly to favor arguments that support that position or proposition. Chaim Perelman has noted "that good reasons are always relative to an audience which appreciates them as such." Thus, our analysis and interpretation of special minority admissions programs will be influenced, more or less, by our perception of the impact of *Bakke* upon the interests and values we hold dear. Surely we know that it is rare for an important decision not to have conflicting relevant principles and values. Nevertheless, we must face the results and consequences of the decision forthrightly and squarely.

Special minority admissions programs are definitely needed and are in the interest of blacks. Moreover, a decision in favor of the University of California Board of Regents in *Bakke* will not produce the same effects as *Plessy v. Ferguson*, because blacks do not have the power to inflict the type of injury upon whites that whites were authorized to inflict upon blacks by *Plessy's* fraudulent separate-but-equal doctrine.

Special minority admissions programs will cause minimal injury to whites. Even with special admissions programs, minorities will continue to be a small percentage of the entering graduate and professional classes across the country. More students are excluded because of other forms of perference (e.g., those favoring children of influential legislators and alumni) than by special admissions programs. Moreover, the standing or injury problem in *Bakke* is not just a procedural technicality. Bakke is really not entitled to relief unless he can prove that he would have been admitted if there had not been a special minority admissions program. The comparatively limited scale of most minority admissions programs should make proof of personal injury very difficult in practically all cases.

Legal Defense. I should now like to turn to a legal defense of special minority admissions programs. My defense will entail some historical exegesis.

The need and desirability of expanding minority group participation in graduate and professional education can hardly be contested. It is also difficult to challenge whether this expansion can take place without special programs and efforts, including affirmative action and minority admissions. However, in dealing with this problem, provisions of the U.S. Constitution and other legal materials, together with certain fundamental principles of legal analysis and exegesis, must be taken into account.

Three overlapping and interrelated constitutional arguments can be made in support of special minority admissions programs. One: the Civil War and Reconstruction Civil Rights Acts, when construed together and structurally, lead to the conclusion that they

were adopted and enacted primarily for the benefit of blacks (freedmen); also, they can be used for the benefit of other discrete, insular, disadvantaged minorities similarly situated as blacks; and they can be used formally and incidentally for the benefit of any group subjected to invidious discrimination. Thus, the primary and secondary purposes of these laws not only prohibit discrimination against these groups, but also impose an affirmative duty upon states to establish and secure equity and justice to these groups. The primary and secondary purposes take priority over the formal and incidental purposes of these laws.

Two: although the equal protection clause of the 14th Amendment may make a classification based upon race suspect, and thus subject to rigorous critical scrutiny, when a compelling legitimate state interest is secured by the classification, it will be constitutional.

Three: the majority may constitutionally discriminate against itself. Professor John Hart Ely in his 1974 *University of Chicago Law Review* article, "The Constitutionality of Reverse Racial Discrimination," has stated this position in the following terms: "Regardless of whether it is wise or unwise, it is not 'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself." This means a minority special admissions program needs only to pass the "rational basis" test of constitutionality.

Before setting forth the arguments of the above three propositions in support of special minority admissions programs, two general observations must be made about the contextual constraints upon the explication and interpretation of legal principles.

First, legal concepts and propositions are value- and rhetoric-laden. They have the qualities of what C. L. Stevenson has labeled as "persuasive definitions." In his book, *Ethics and Language*, Stevenson writes about such definitions: "In any 'persuasive definition' the term defined is a familiar one, whose meaning is both descriptive and strongly emotive." For example, whenever "right" is used in the law, it not only denotes some claim recognized and presumably enforced by the law, but also connotes something that is good and ethically proper. Thus, the very use of such terms "consciously or unconsciously . . . by [the] interplay between emotive and descriptive meaning" redirects people's attitudes.

Unfortunately the very use of the term "preferential" tends to invoke a negative emotional reaction which creates a hostile attitude toward preferring any individual or group over another — particularly in a society which professes egalitarianism. This problem is especially troublesome in the context of admission to college, since public and educational policy purports to advance "open admission or access" to and merit in college today.

Moreover, as has been argued by critics of the Warren Court, proper admission criteria as well as legal principles for decision making should be "neutral." Neutrality is largely an illusion in both instances. Value choices are inescapable, both in formulating legal concepts and principles and in decision making. Legal analysis — and for that matter public debate over any issue — can be advanced rationally and fairly only when value choices and emotive connotations are brought to the surface. Even when this desirable state of disputation and communication is reached, persuasive arguments always seem to be the function of an audience that appreciates or is sensitive to the values advanced. In most contexts, very few would object to preferring law-abiding citizens over lawbreakers. For more than 300 years the majority of Americans have had very little difficulty with preferring whites over blacks. Thus, it is the attitude of the majority group toward a minority group that will determine its reaction to compensatory treatment of the latter.

Second, and related to what has already been said, all laws in a sense discriminate or make distinctions. They create classifications, and classifications, just as conceptions, if they are meaningful and minimally ambiguous and vague, include some things and exclude other things. This is the reason why the Constitution condemns invidious discrimination or classification, not discrimination or classification per se. Furthermore, it does not follow from this that all racial classifications are

necessarily invidious. What the drafters of the 13th, 14th and 15th Amendments were primarily concerned with was invidious discrimination against freedmen or blacks. They were attempting to prevent the enactment and enforcement of laws and practices that would denigrate the position of blacks. The black codes and other oppressive activities of the Confederate States after the Civil War not only denigrated the positions of blacks, but also destroyed the lives and property of many blacks. The historical mistreatment of blacks and other minority groups supports the proposition that opposition to special minority admissions programs really provides an excuse for expressing an ill will and hostility toward blacks that already exists.

The Reconstruction Amendments were adopted primarily for the benefit of blacks (freedmen). This does not mean that all Reconstruction laws were only for the benefit of blacks or that specific provisions were not primarily for the benefit of all. What it does mean is that at the center of the problems and mischief that the Reconstruction laws were designed to correct were blacks and their sad plight.

The 13th Amendment freed the slaves. The Civil Rights Act of 1866 extended citizenship to blacks, the right to make contracts, to hold and enjoy property, to serve as witnesses, and to enjoy the equal benefits of all laws. It also provided criminal sanctions for violating these rights.

Except for formally freeing blacks, the 13th Amendment and the 1866 Civil Rights Act remained practically dormant, as far as the welfare of blacks was concerned, until 102 years later when the Supreme Court held, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that the amendment empowered Congress in the 1866 Act to prohibit private individuals from discriminating against blacks in the sale of property. The Court maintained that Congress could enact any legislation appropriate for "abolishing all badges and incidents of slavery." Obviously, this line of analysis supports not only reversing discrimination (special admissions programs) but also, most certainly, affirmative action programs.

Some lingering doubts about the constitutionality of the 1866 Civil Rights Act resulted in the proposal, adoption and ratification of the 14th Amendment. The first sentence of this amendment overruled the infamous Dred Scott decision and made blacks citizens of the United States and of the states wherein they resided. It prohibited abridging the privileges and immunities of citizens of the United States, depriving any person of due process of law and denying any person the equal protection of the laws. Although the privileges and immunities clause was made practically meaningless in the Slaughterhouse cases, Justice Samuel F. Miller in the course of his opinion stated that he doubted whether any discrimination directed against a group other than "Negroes as a class or on account of their race, will ever be held to come within the purview of [the equal protection clause]." He further stated that the "pervading purpose" of the 13th, 14th and 15th Amendments was to secure the "freedom of the slave race" and to protect them "from the oppressions of those who had formerly exercised unlimited dominion over him."

Of all the provisions of the 14th Amendment, the due process clause is least amenable to a pro-black interpretation. However, although it is relevant to the admission process, it really does not raise a high hurdle to special minority admissions.

The 15th Amendment was almost, if not completely, concerned with protecting the right of blacks to vote. It prohibited abridging the right to vote "on account of race, color or previous condition of servitude." The Latin maxim of construction, *noscitur a sociis*, makes clear that the 15th Amendment was primarily, if not entirely, for the benefit of blacks. It means that words are known from their accompanying words. Thus, general and specific words capable of analogous meaning, when associated together, take on meaning from each other such that general words are restricted to a sense analogous to the less general words. "Previous condition of servitude" is less general than "race" and "color." For all practical purposes, at the time of the adoption of the 15th Amendment only blacks had experienced a previous condition of servitude.

In addition to the 1866 Civil Rights Act, six

other acts were enacted by Congress between 1866 and 1875 that could be characterized as civil rights acts. In 1867, Congress made the reestablishment of government in the Confederate States conditional upon the ratification of new state constitutions written by delegates elected by citizens "of whatever race, color or previous condition." Two more Civil Rights Acts were enacted in 1866 and 1867 to prevent a return to slavery in different disguises. One act prevented and punished kidnapping; the other abolished and prohibited forever the system of peonage. In 1860, Congress enacted the Enforcement Act which was amended in 1871. This act provided both civil and criminal relief against those who flouted or circumvented the rights secured by the 14th and 15th Amendments. In 1871, Congress enacted the Anti-Ku Klux Klan Act in order to deal comprehensively with the violence of the Klan by prohibiting conspiracies to obstruct justice, to interfere with elections, and to deny to any person equal privileges and immunities. The seventh and final Civil Rights Act of 1875 prohibited discrimination on the basis of race or color in inns, public conveyances on land or water, the theater and other places of amusement.

This brief review of the Reconstruction Amendments and Civil Rights Acts is most important to make credible the contention that Congress, in proposing the amendments and in enacting the acts, was preoccupied with the rights and interests of blacks. Structural analysis of these legal materials means that when they are all considered together they require a pro-black interpretation stronger than any single amendment or act alone may dictate. This is an example of the modified Euclidean axiom that the whole may be greater than the sum of the parts.

Constitutional Issues. There are three major constitutional issues posed by race-conscious admissions programs. The first is whether racial classifications are per se invalid. The second is whether they can withstand the strict scrutiny and compelling state interest test that is applied when classifications are based upon suspect classifications such as race or touch fundamental rights such as travel. The third is whether in some special situations, race-conscious classifications need only meet the "rational basis" test.

Racial classifications are not invalid per se. Racial classifications have been resorted to in order to remedy racial discrimination in both public-school desegregation and public-employment cases. Busing amd considerations of racial balance and proportion were upheld in 1971, in *Swann v. Board of Education.* Strict numerical quotas and ratios in hiring minorities have been decreed or approved by lower federal courts without the disapproval of the U.S. Supreme Court.

Clearly, where injuries and injustices have been inflicted on the basis of race, race cannot be totally disregarded in compensating for or correcting them. The U.S. Supreme Court has not held that racial classifications are invalid per se. The Court has simply held that legislation and state action based upon racial classifications carry a very heavy burden of justification, which must withstand the most rigorous scrutiny. This means the classification must be proved "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the 14th Amendment to eliminate." This means the classification must be proved "necessary to promote a compelling governmental interest."

The reversal of discrimination is a compelling interest. The Supreme Court has not clearly articulated what is meant by a compelling governmental interest. In the educational context, a strong argument could be made for the proposition that integration is a compelling governmental interest.

Thus, special minority admissions programs should not be characterized as "reverse discrimination," but as the "reversal of discrimination." The Washington Supreme Court in *DeFunis* found that the state had a compelling state interest in correcting the underrepresentation of minorities in law schools and thus in the legal profession. Minorities are grossly underrepresented throughout higher education, but particularly in graduate and professional schools. Professor Ely writes: "If we are to have even a chance of curing our society of the sickness of racism we will need a lot more black professionals. And whatever the complex of reasons, it seems we will not get them in the forseeable future unless we

take blackness into account and weigh it positively when we allocate opportunities."

Benign racial classifications are not always necessarily suspect. Although supporters of special minority admissions programs usually believe that the "suspect classification" and "compelling state interest" tests apply, two closely related arguments can be made in support of applying the conventional equal-protection analysis to benign racial classifications. The conventional test requires only a rational relationship between the classification and a legitimate governmental interest.

First, if blacks and other similarly situated minorities are considered as the primary and secondary beneficiaries of the Reconstruction Amendments, including, of course, the equal protection clause, then racial classifications clearly designed to benefit them would not violate the equal protection of the laws. Although on a number of occasions it might be difficult to determine whether a racial classification is clearly designed to benefit a minority, that is not the situation with special minority admissions programs. They are designed to expand minority-group access to graduate and professional education.

Second, the equal protection requirement obviously is designed to protect discrete, insular, disadvantaged minorities from exploitation and oppression by the majority. However, if a majority wishes to disadvantage itself in order to correct past and present injustices perpetrated against a minority, then the equal protection clause should not be a bar to this legitimate state interest and goal.

Much has already been said to substantiate the claim that opposition to affirmative action conceals hostility to blacks. However, sometimes things are done that hurt affirmative action perhaps unintentionally. An example is the March 18, 1977, *New York Times* story of an interview with Joseph A. Califano, Secretary of the Department of Health, Education and Welfare. The title of the story was, "Califano Says Quotas Are Necessary to Reduce Bias in Jobs and Schools." Yet nowhere in the story or interview did Califano use the word "quota." A storm of protest arose and Califano later retracted his sound, strong statements on affirmative action because of that misleading headline.

Frequently in conversations, and by implication in articles and news stories, affirmative action and special minority admissions programs are discussed as if unqualified employees are hired or incompetent students are admitted. Nothing could be further from the truth.

The recent Gallup Poll, which reports opposition even by blacks to affirmative action and special minority admissions programs, reflects the way the issue has been publicized in the media. If media talk is constantly of "quotas," "reverse discrimination," and color-blindness in the abstract, then it is natural for there to be considerable opposition. "Goals" should be used in place of "quotas"; "reversal of discrimination" in place of "reverse discrimination"; and "color-conscious correction" of color-biased injuries in place of "color-blindness."

Few people familiar with the basic facts in this area believe one can deal effectively with minority-group access to graduate and particularly professional schools without taking race into account. Special admission of certain minorities is necessary in order to correct their underrepresentation in those schools. This correction will help accomplish the compelling state interest of integration (reversal of discrimination) and approximate proportional representation in the professional classes.

Resistance to these objectives is largely a vestige of racism. The constitutional barriers to them are more apparent than real. The Reconstruction Amendments and Civil Rights Acts were primarily and secondarily for the benefit of, respectively, blacks and other discrete, disadvantaged minorities similarly situated.

If race is regarded as a suspect classification requiring rigorous scrutiny in preferential admission programs, it is necessary to accomplish the compelling state interest of integration and approximately proportional minority participation in graduate and professional education.

Once it is determined that the racial classification is benign, it can be argued that the rational-basis test of constitutionality under the due process and equal protection clauses is applicable, which means there only need be a rational relationship between the classification and a legitimate governmental interest or objective.

Antidiscrimination laws have moved from a process orientation to a result orientation. This parallels the movement in school litigation from desegregation to integration. Clearing away arbitrary racial barriers, although necessary, was not sufficient to do justice to blacks and other oppressed minorities. More and more there has been an insistence upon results. Therefore, programs of affirmative action and minority preferential admissions have been instituted.

Logically and practically it could not reasonably be expected that wrongs that have their source in invidious racial classifications could be corrected and compensated for without benignly taking race into account.

Appendix II — Program

WEDNESDAY, APRIL 26, 1978

8:00 a.m. — Registration

8:30 – 10:15 a.m. — THE BAKKE CASE: PAST, PRESENT AND FUTURE

- **Welcome**
  T. EDWARD HOLLANDER, Chancellor, New Jersey, President, SHEEO
- **Introduction**
  LOUIS RABINEAU, Project Director, Inservice Education Program, ECS
- **Facts and Issues in the Bakke Case**
  ROBERT B. McKAY, Director, Justice Program of the Aspen Institute

  Commentators: HOWARD L. GREENBERGER, Professor of Law, Director of Foreign Law Institutes, New York University School of Law
  LARRY LAVINSKY, New York City Attorney; author of amicus brief for Anti-Defamation League and others
  DREW S. DAYS III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

10:15 a.m. — Coffee Break

10:30 a.m. – 12:30 p.m. — FROM DISCRIMINATION TO AFFIRMATIVE ACTION

Moderator: JAMES A. NORTON, Chancellor, Ohio

Historical Review: BENJAMIN PAYTON, Program Officer, Education and Research, Ford Foundation

Commentators:

Medicine: JAMES CURTIS, M.D., Associate Dean, Cornell University Medical College

Law: MILLARD RUUD, Executive Director, Association of American Law Schools

Undergraduate Studies: KENNETH S. TOLLETT, Director, Institute for the Study of Educational Policy, Howard University

12:30 – 2:00 p.m. — Luncheon

Moderator: ELOISE TURNER, Executive Secretary, District of Columbia Commission on Postsecondary Education, Chief – D.C. State Educational Services Division, Office of State Agency Affairs

- TOWARD A FAIR AND SENSIBLE ADMISSIONS POLICY

Speaker: PETER J. LIACOURAS, Dean and Professor of Law, Temple University School of Law, Philadelphia

2:00 – 3:15 p.m.

- TESTING: WHAT CAN AND CANNOT BE DONE

Moderator: RICHARD M. MILLARD, Director, Postsecondary Education Department, ECS

Commentators: ROY FORBES, Director, National Assessment of Educational Progress
WINTON MANNING, Senior Vice President for Development and Research, Educational Testing Service

3:30 – 5:00 p.m.

- WHAT THE FUTURE HOLDS

Chairman: E. T. DUNLAP, Chancellor, Oklahoma

Moderator: FRANCIS KEPPEL, Director, Aspen Institute Program in Education for a Changing Society, Senior Lecturer for Educational Practice, Harvard Graduate School of Education

Commentators: WARREN HILL, Executive Director, Education Commission of the States
JACK PELTASON, President, American Council on Education

5:00 – 6:00 p.m.

- **Social Hour**

Host: ROBERT GALE, President, Association of Governing Boards of Universities and Colleges

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, v. Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

Syllabus

REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* BAKKE

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 76-811. Argued October 12, 1977—Decided June 28, 1978

The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering class of 100 students—the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), his rating being based on the interviewers' summaries, his overall grade point average, his science courses grade point average, and his Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score." The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special admissions program. The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians, American Indians). If an applicant of a minority group was found to be "disadvantaged," he would be rated in a manner similar to the one employed by the general admissions committee. Special candidates, however, did not have to meet the 2.5 grade point cut-off and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given bench-

mark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period 63 minority students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. Respondent, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected since no general applicants with scores less than 470 were being accepted after respondent's application, which was filed late in the year, had been processed and completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than respondent's. After his second rejection, respondent filed this action in state court for mandatory injunctive and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides, *inter alia*, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance. Petitioner cross-claimed for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that petitioner could not take race into account in making admissions decisions, the program was held to violate the Federal and State Constitutions and Title VI. Respondent's admission was not ordered, however, for lack of proof that he would have been admitted but for the special program. The California Supreme Court, applying a strict-scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds the court held that petitioner's special admissions program violated the Equal Protection Clause. Since petitioner could

not satisfy its burden of demonstrating that respondent, absent the special program, would not have been admitted, the court ordered his admission to Davis.

Held: The judgment below is affirmed insofar as it orders respondent's admission to Davis and invalidates petitioner's special admissions program, but is reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions.

18 Cal. 3d 34, 553 P. 2d 1152, affirmed in part and reversed in part.

MR. JUSTICE POWELL concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 12–18.

2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause. Pp. 18–49.

3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted. P. 49.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 4–31.

2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions. Pp. 31–55.

MR. JUSTICE STEVENS, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis. Pp. 1–14.

Syllabus

POWELL, J., announced the Court's judgment and filed an opinion expressing his views of the case, in Parts I, III–A, and V–C of which WHITE, J., joined; and in Parts I and V–C of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., filed an opinion concurring in the judgment in part and dissenting in part. WHITE, MARSHALL, and BLACKMUN, JJ., filed separate opinions. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined.